MOHD NAJIB HJ AHMAD

v.

LEMBAGA PADI DAN BERAS NEGARA

COURT OF APPEAL, KUALA LUMPUR
SITI NORMA YAAKOB JCA
ABU MANSOR ALI JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEAL NO: W-02-640-96]
7 SEPTEMBER 1998

ADMINISTRATIVE LAW: *Public officer - Disciplinary proceedings - Disciplinary Committee considering extraneous material without giving appellant opportunity to rebut - Whether there was procedural unfairness - Whether a breach of natural justice - Lembaga Padi Dan Beras Negara Act 1971, s. 10 - Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980, General Orders 4, 5, 36*

CIVIL PROCEDURE: *Pleadings - Purpose of pleadings - Suit by public officer for wrongful dismissal - Statement of claim - Omission to allude to Public Officers (Conduct and Discipline) (Chapter "D") General Orders, 1980 - Whether appellant barred from questioning disciplinary actions undertaken by respondent under the General Orders - Whether parties fully aware of nature of dispute - Whether not taken by surprise - Whether omission a non-issue*

EVIDENCE: *Witness - Oral evidence - Oral evidence by plaintiff himself and not from other third party - Whether trial judge entitled to conclude that plaintiff called no witness whatsoever*

The appellant was employed by the respondent as its assistant director of training. Sometime in 1990, allegations were made that the appellant had conducted himself in breach of the provisions of the Public Officers (Conduct and Discipline) (Chapter "D") General Orders, 1980 ('the 1980 General Orders'). The respondent's disciplinary committee ('the committee'), which investigated the allegations, found the charges proved, and punished the appellant *inter alia* by reducing his salary points pursuant to General Order 36(g) of the 1980 General Orders. On appeal, however, the punishment was substituted by the respondent with one of dismissal from service, pursuant to General Order 36(i) of the 1980 General Orders.

The appellant filed a wrongful dismissal suit against the respondent, but the suit was dismissed by the learned trial judge on the grounds, firstly, that the appellant, in giving the oral evidence himself, had called no witness whatsoever, and secondly, that the appellant, having omitted to allude to the 1980 General Orders in his amended statement of claim, could not question the propriety of the respondent's action under the said General Orders. The facts also showed that, apart from considering the charges and the appellant's reply thereto, the committee, when meting out the punishments, had also considered what they termed as "lain-lain maklumat yang berkaitan". At the trial, the respondent did not explain what this "lain-lain maklumat berkaitan" meant, and that being so, before the learned judge, an argument was raised by the appellant that the proceedings before the committee was tainted with procedural unfairness, as the committee had taken into account extraneous matters which the appellant had no means of rebutting or commenting upon. This argument, however, was given no consideration at all by the learned trial judge, and an issue hence arose in this appeal as to whether the decision of the learned trial judge below is sustainable in the circumstances.

Held:
Per Siti Norma Yaakob JCA

[1] The fact that the oral evidence came from the appellant himself and not from any other third party called on his behalf does not entitle the learned judge to conclude that the appellant called no witness whatsoever. The appellant is as much a witness as any other person called to testify on his behalf, and in this case, has called evidence to prove his case although the evidence came from himself.

[2] The object of an averment in a pleading is to give due notice to the other party in the proceedings of the presence of an issue to be raised at the trial, so that the other party is well prepared to meet the challenge and not be taken by surprise. In this case, the omission to aver the 1980 General Orders in the amended statement of claim is a non-issue, as both parties were aware that the dispute over the appellant's dismissal stemmed from proceedings under the provisions of the 1980 General Orders. It is clear that, under the circumtances, the element of surprise does not arise at all, and the learned judge was in error when she upheld the respondent's contention in this respect. The learned judge should have rejected the contention that the appellant cannot question the respondent's action in taking disciplinary action under the 1980 General Orders on the ground that he had not averred to the General Orders in his pleading.

[3] The doctrine of substantive fairness or procedural fairness are the new terminologies of what we have all along referred to as the rules of natural justice, ie, impartiality and fairness.

[3a] The words "lain-lain maklumat yang berkaitan", not being explained for by the respondent, must mean what they say, namely, extraneous material had been taken into account without giving the appellant the opportunity to comment or rebut. Such extraneous material had influenced the committee in arriving at their decision, and clearly, such reliance had prejudiced the appellant. On this ground alone the appellant is entitled to succeed on his appeal.

[4] As there was procedural unfairness in the proceedings before the committee, it follows that the respondent's action in affirming the decision of the committee cannot be supported as being bad in law and that the punishment of dismissal cannot be upheld as being null and void. This ground, by itself, is also sufficient to allow the appeal.

[5] The submission in respect of the extraneous material issue had been made before the learned judge, but the learned judge had not directed her mind thereto. This omission is a misdirection which had occasioned a miscarriage of justice.

[Appeal allowed; judgment to appellant in terms of paras. 13(a), (b) & (c) of amended statement of claim.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu bekerja dengan responden sebagai penolong pengarah latihan. Dalam tahun 1990, tuduhan telah dibuat bahawa perayu telah berkelakuan dengan cara yang melanggar peruntukan Perintah-perintah Am (Kelakuan dan Tatatertib) (Bab "D") Pegawai-pegawai Awam 1980 ('Perintah-perintah Am 1980'). Lembaga tatatertib responden ('lembaga'), yang menyiasat tuduhan-tuduhan tersebut, mendapati tuduhan telah dibuktikan dan menghukum perayu, antara lain, dengan cara mengurangkan markah gaji perayu berdasarkan peruntukan Perintah Am 36(g) Perintah-perintah Am 1980. Hukuman ini, bagaimanapun, telah digantikan oleh responden dengan hukuman pemecatan di bawah Perintah Am 36(i) Perintah-perintah Am 1980 setelah rayuan dibuat kepadanya.

Perayu telah memfail tindakan kerana pemecatan salah terhadap responden, tetapi tindakan tersebut ditolak oleh hakim perbicaraan yang bijaksana atas alasan, pertama, bahawa perayu tidak memanggil sebarang saksi apabila memberi keterangan lisannya secara bersendirian, dan kedua, bahawa perayu, setelah gagal menyebut tentang Perintah-perintah Am 1980 dalam pernyataan

tuntutan terpindanya, tidak boleh menyoal keteraturan tindakan yang diambil oleh responden di bawah Perintah-perintah Am tersebut. Fakta juga menunjukkan bahawa selain dari menimbang tuduhan-tuduhan dan jawapan perayu, lembaga, dalam menjatuhkan hukuman mereka di sini, telah juga mengambilkira apa yang mereka panggil "lain-lain maklumat yang berkaitan". Responden tidak menjelaskan apa yang dimaksudkan dengan "lain-lain maklumat yang berkaitan", dan oleh kerana itu, di hadapan hakim yang bijaksana, satu hujah telah dibangkitkan oleh perayu bahawa prosiding di hadapan lembaga tersebut telah dicemari oleh ketidakadilan prosedur, oleh kerana lembaga telah mengambilkira hal-hal luaran yang mana perayu tidak berpeluang untuk menyanggah atau memberi komen. Hujah ini, bagaimanapun, langsung tidak diberi perhatian oleh hakim yang bijaksana, dan dengan itu, di dalam rayuan ini, telah berbangkit isu samada keputusan hakim perbicaraan yang bijaksana di bawah, dalam halkeadaan yang wujud, boleh dipertahankan.

Diputuskan:

Oleh Siti Norma Yaakob HMR

[1] Fakta bahawa keterangan lisan datangnya cuma dari perayu sendiri dan tidak dari mana-mana pihak ketiga tidak memberi hak kepada hakim yang bijaksana membuat rumusan bahawa perayu langsung tidak memanggil saksi. Perayu juga adalah seorang saksi sepertimana halnya dengan orang lain yang dipanggil sebagai saksi. Perayu dalam kes ini, dengan itu, telah memanggil keterangan untuk membuktikan kesnya walaupun keterangan tersebut datang dari dirinya sendiri.

[2] Tujuan sesuatu pernyataan dalam pliding ialah untuk memberi notis kepada pihak yang lain dalam prosiding tersebut tentang kewujudan sesuatu isu yang akan ditimbulkan pada masa perbicaraan, agar pihak yang lain itu bersedia untuk menghadapi tuntutan dan tidak merasa terkejut. Dalam kes ini, ketinggalan untuk menyebut Perintah-perintah Am 1980 dalam tuntutan pernyataan terpinda adalah suatu "non-issue", oleh kerana kedua-dua pihak menyedari bahawa pertelingkahan berkaitan pemecatan perayu berpunca dari prosiding di bawah peruntukan Perintah-perintah Am 1980. Ianya jelas bahawa, dalam keadaan sedemikian, elemen kejutan tidak berbangkit sama sekali, dan hakim yang bijaksana adalah silap bilamana beliau membenarkan hujahan responden dalam hal ini. Hujahan bahawa perayu tidak boleh mempersoal tindakan responden mengambil tindakan disiplin di bawah Perintah-perintah Am 1980 kerana perayu tidak menyebut Perintah-perintah tersebut dalam plidingnya seharusnya ditolak oleh hakim yang bijaksana.

[3] Doktrin keadilan substantif atau keadilan prosedur adalah terminologi baru tentang apa yang selama ini digelar keadilan asasi, yakni, tidak berat sebelah dan adil.

[3a] Perkataan "lain-lain maklumat yang berkaitan", yang tidak dijelaskan maksudnya oleh responden, mestilah bermakna apa yang dikatakannya, iaitu, maklumat-maklumat luaran telah diambilkira tanpa memberi peluang kepada perayu untuk menyanggahnya. Maklumat luaran tersebut telah mempengaruhi lembaga dalam keputusannya, dan kebergantungan sedemikian jelas telah memprejudis perayu. Atas alasan ini semata-mata rayuan perayu sudah pun boleh berjaya.

[4] Oleh kerana terdapat ketidakadilan prosedur dalam prosiding di hadapan lembaga, ianya mengikut bahawa tindakan responden mengesahkan keputusan lembaga tidak boleh di sokong kerana ianya 'bad in law' dan hukuman pemecatan juga tidak boleh dipertahan sebab ianya 'null and void'. Alasan ini, secara bersendiri, juga mencukupi untuk membenarkan rayuan.

[5] Hujah berhubung dengan isu maklumat-maklumat luaran telah pun dikemukakan kepada hakim yang bijaksana, tetapi hakim yang bijaksana tidak pun mengendahkan hujahan tersebut. Ketinggalan ini adalah satu salah arahan yang telah menyebabkan satu salah laksana keadilan.

[Rayuan dibenarkan; penghakiman kepada perayu mengikut terma perenggan 13(a), (b) & (c) tuntutan pernyataan terpinda.]

Cases referred to:

B Surinder Singh Kanda v. The Government of the Federation of Malaya [1962] 28 MLJ 169 ***(refd)***

Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor [1992] 2 CLJ 1125 ***(refd)***

Raja Abdul Malek Muzaffar Shah Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 CLJ 619 ***(refd)***

Shamsiah Ahmad Sham v. Public Services Commission, Malaysia & Anor [1991] 1 CLJ 23 ***(refd)***

Legislation referred to:

Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980, 4(2), (c)(i), (ii), 5(1)(a), (b), (c), 5, (4), 36(a), (b), (g), (i)

Lembaga Padi Dan Beras Negara Act 1971, s. 10(1), (3)

For the appellant - PM Mahalingam (SG Lingam with him); M/s SG Lingam & Co
For the respondent - Shakir Hussain; M/s Mohamed Noor Don & Assoc

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S4-21-76-93]

Reported by WA Sharif

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JUDGMENT

Siti Norma Yaakob JCA:

This appeal arises from a wrongful dismissal suit brought by the appellant against his employer, the respondent wherein the appellant impeached the b respondent's decision made on 25 September 1990 that confirmed an earlier decision made by its disciplinary committee that found the appellant guilty of the charges levelled against him and substituted the punishments meted by the disciplinary committee to one of dismissal. In his civil suit, the appellant's principal prayer is for a declaration that the respondent's decision dated 25 c September 1990, is null and void and that he be reinstated to his former position as the assistant director of training in the respondent's employment without any loss of seniority or promotion.

The appellant was employed by the respondent in November 1972, as an assistant enforcement director and confirmed in that position in 1973 and d placed in the permanent and pensionable establishment. In 1980, he was promoted to hold the position of senior assistant director in charge of marketing. Later he assumed the post of assistant director with special powers and in 1982 he was transferred to the respondent's training section and held the position of an assistant director of training until he was dismissed on e 25 September 1990.

Disciplinary proceedings were first commenced against the appellant in early 1990 when he received a letter dated 7 February 1990 from the respondent's disciplinary committee. In that letter the appellant was asked to show cause f why disciplinary action with a view to his dismissal should not be taken against him following investigations carried out by the disciplinary committee in respect of four specific complaints received by the disciplinary committee against him. These complaints relate to his active involvement in a series of lectures on milling technology, held between 29 to 31 May 1989, at Hotel Equatorial, Penang. The training course was organised and conducted by a g company, Netwin Sdn. Bhd. (the company) of which he was one of four directors. A participant in that course was charged RM300 by the company. The appellant is alleged to have used his official position to officially declare the training course open and had also lectured to the course participants. By his acts and omissions the disciplinary committee found that he had:

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(1) failed to disclose to the respondent that he had been a director of the company since 4 January 1989;

(2) failed to obtain written permission from the respondent of his involvement with the company;

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(3) utilised his approved leave during the period of 29 May – 18 June 1989, to be directly involved in the activities of the company namely his active participation in the training course organised and conducted by the company;

(4) failed to obtain the necessary permission to participate in the same training course.

The appellant was also reminded that as an officer of the respondent he was bound by the provisions of s. 10(1) and (3) of the Lembaga Padi Dan Beras Negara Act 1971 (Act 47) under which he was appointed. The investigations revealed:

(1) that there had been a conflict of interests between his personal and public duties as an officer of the respondent;

(2) that he had used his official position for his personal gain;

(3) that he had involved himself either directly or indirectly in the affairs of a company for reward;

(4) that without the permission of the respondent, he had utilised his approved leave to engage himself in personal activities for reward.

The appellant was told that his aforesaid conduct were in breach of General Orders 4(2)(c)(i) and (ii); 5(1)(a), (b), (c) and 5(4) of the Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980, (the 1980 General Orders), for which he was liable to be disciplined. He was given 14 days from the date of receipt of the letter to reply to the aforesaid charges.

The appellant received the show cause letter on 8 February 1990 and he responded by way of his letter dated 21 February 1990. In it he practically admitted to all the wrongdoings but contended that his actions were motivated by the noble intention of assisting a bumiputra company in disseminating knowledge of a subject of which he had the experience and technical know how. He received no reward either in cash or in kind for his services.

The disciplinary committee met on 7 March 1990 and after considering the charges against the appellant, his reply to the charges and other relevant factors, decided that the charges were made out and imposed the following punishments on the appellant pursuant to General Order 36(a), (b) and (g) of the 1980 General Orders.

(1) A warning

(2) A reprimand and

(3) A reduction of 3 salary points based on the salary scale of Grade A22 for 3 years with effect from 1 April 1990 until 31 March 1993.

The decision of the disciplinary committee was made known to the appellant by letter dated 13 March 1990 and the appellant was given 14 days to appeal to the respondent.

The appellant did so by his letter dated 14 March 1990 addressed to the respondent but confined his appeal to that part of the punishment relating to the reduction in his salary. The respondent met on 12 June 1990 to consider the appeal and after weighing all matters, dismissed the appeal, and substituted the punishments imposed by the disciplinary committee with one of dismissal from service pursuant to General Order 36(i) of the 1980 General Orders, to take effect from the date of the letter.

The appellant responded by filing his civil suit on 7 July 1993 and he was represented by solicitors throughout as was the respondent. At the trial, only the appellant gave oral evidence but he was not cross examined. The respondent elected not to call any witness and on 25 September 1996, the learned trial judge dismissed the appellant's claim with costs.

The first attack on the learned judge's written judgment is her finding that the appellant called no witness to testify on his behalf. We say that this cannot be right as the appellant had been in the witness box and given oral evidence and the notes of proceedings testify to this. The fact that the oral evidence came from the appellant himself and not from any other third party called on his behalf does not entitle the learned judge to conclude that the appellant called no witness whatsoever as he is as much a witness as any other person called to testify on his behalf. In this instance, he relied entirely on his own evidence and we say that in that situation he had called evidence to prove his case although that evidence came solely from himself. Now whether such evidence is sufficient to prove his case is quite another matter but the fact remains that he gave evidence to support his claims.

In the court below, the learned judge upheld the respondent's objection that the appellant cannot contend that the respondent had no authority to take any disciplinary action against him under the 1980 General Orders as no averment was made in the appellant's amended statement of claim as to his reliance on the General Orders. In arriving at such a finding, the learned judge reasoned that since parties are bound by their own pleadings, the appellant cannot raise any issue with reference to the 1980 General Orders as there is no averment to the General Orders in his pleadings.

The object of an averment in a pleading is to give due notice to the other party in the proceedings of the presence of an issue to be raised at the trial so that the other party is well prepared to meet the challenge and not be taken by surprise and the issue litigated in an orderly manner. In the instant appeal we consider that the omission to aver to the 1980 General Orders in the amended statement of claim is a non issue as both parties were aware that the dispute over the appellant's dismissal stemmed from proceedings under the provisions of the 1980 General Orders. This is clear from the respondent's own documentary evidence namely the show cause letter dated 7 February 1990 where at paras 3 and 4, references were made to specific provisions in the 1980 General Orders under which the disciplinary action was taken. The respondent's subsequent correspondence on the same subject matter in letters dated 13 March 1990 and 25 September 1990, all allude to the 1980 General Orders as the authority for acting as they did and under these circumstances the element of surprise does not arise at all. Here again, the learned judge should not have accepted the respondent's contention that the appellant cannot question the respondent's action in taking disciplinary action under the 1980 General Orders on the ground that there had been an omission to aver to the General Orders in the appellant's pleading.

Clearly the learned judge fell into error when she upheld the respondent's contention.

We now come to the more substantial ground of appeal that there had been a denial of the doctrine of substantive fairness in proceedings before the disciplinary committee when it took into account matters of which the appellant had no notice of and for which he had no opportunity to reply. The doctrine of substantive fairness as referred to by Edgar Joseph Jr., SCJ, in the case of *Dewan Undangan Negeri Kelantan & Anor. v. Nordin bin Salleh & Anor.* [1992] 1 MLJ 697, or procedural fairness as alluded to by this court in the case of *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & 2 Ors.* [1995] 1 CLJ 619, are the new terminologies of what we have all along referred to as the rules of natural justice ie, impartiality and fairness. See the Privy Council case of *B. Surinder Singh Kanda v. The Government of the Federation of Malaya* [1962] 28 MLJ 169.

In this aspect, the appellant is not objecting to the fact that he was not present before the disciplinary committee to plead his case when it met on 7 March 1990 to deliberate on the matter of his dismissal. What is being questioned is that the disciplinary committee took into consideration extraneous matters which the appellant had no opportunity to comment or rebut. This is clear from the first paragraph of the letter dated 13 March 1990 addressed to the appellant wherein the disciplinary committee stated as follows:

PERKARA: TINDAKAN TATATERTIB

Jawatankuasa Tatatertib (Kumpulan A) Lembaga di dalam mesyuarat pada 7hb Mac, 1990 setelah menimbangkan dengan teliti pertuduhan-pertuduhan ke atas tuan dan jawapan-jawapan yang diberi oleh tuan dan **lain-lain maklumat yang berkaitan,** memutuskan bahawa tuan dikenakan hukuman-hukuman berikut: (Emphasis is ours.)

The appellant complains that he does not know what the offending words **"lain-lain maklumat yang berkaitan"** refer to and contends that the proper construction to be placed on those words is that prejudicial extraneous material had been taken into consideration and he was not given the opportunity to rebut it.

The same fact situation was present in the case of *Raja Abdul Malek Muzaffar Shah, supra,* which was also a wrongful dismissal case. In that case, this court had to consider the meaning of the very same phrase appearing in a letter of dismissal addressed to the plaintiff and it held that the phrase "would leave a reasonable man with the distinct impression that the defendants gave weight to certain material information that was never put to the plaintiff. Of course it was always open to the defendants to have given a full explanation as to what was meant by the critical phrase".

The respondent had every opportunity to explain what other relevant information was considered by the disciplinary committee at the trial but they opted to remain silent and we are only left with the printed words and they must mean what they say ie, extraneous material had been taken into account without giving the appellant the opportunity to comment or rebut. Such extraneous material must have played a part in influencing the disciplinary committee to arrive at its decision to mete three separate forms of punishment against the appellant and we say that reliance on such extraneous material had prejudiced the appellant as he was not given the right of rebuttal. See the case of *Shamsiah bte Ahmad Sham v. Public Services Commission, Malaysia & Anor*. [1990] 3 MLJ 364. On this ground alone the appellant is entitled to succeed on his appeal.

We also notice from the notes of proceedings, that submission on that behalf was made to the learned judge but she has not directed her mind to that aspect of the case and this omission, we say, is a misdirection which we consider had occasioned a miscarriage of justice.

As there had been procedural unfairness in the proceedings before the disciplinary committee, it follows that the respondent's action in affirming the decision of the disciplinary committee cannot be supported as being bad in law and that the punishment of dismissal cannot be upheld as being null and

void. As this ground alone is sufficient for us to allow the appeal, we see no purpose of considering the other submission made by Mr. Mahalingam, counsel for the appellant that the respondent had no authority to enhance the punishment meted by the disciplinary committee.

We had accordingly allowed the appeal with costs here and below and entered judgment to the appellant in terms of paras 13(a), (b) and (c) of his amended statement of claim. We also ordered the deposit made in this appeal to be refunded to the appellant.